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No. 2 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1969

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, PETITIONER

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF PROHIBITION AND/OR MANDAMUS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
PHILIP A. LACOVARA,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
Summary of argument	12
Argument:	
I. This Court has jurisdiction to entertain the petition for a writ of mandamus or prohibition	14
A. At least when its orders are directed to a district judge to regulate the exercise of his official duties, a judicial council is acting as a judicial tribunal for purposes of this Court's appellate jurisdiction under Article III of the Constitution	15
B. This Court possesses sufficient statutory authority to entertain this petition for an extraordinary remedy	21
II. In the present posture of the case, petitioner is not entitled to any relief	31
A. The first order entered by the judicial council, even if objectionable, has been revoked	32
B. The assignment order currently in effect is within the lawful authority of the Judicial Council	39
Conclusion	51

CITATIONS

Cases:	
ACF Industries, Inc. v. *Guinn*, 384 F. 2d 15, certiorari denied, 390 U.S. 949	34
Bradley, Ex parte, 7 Wall. 364	21, 27, 29
Briggs, Ex parte, 15 F. 2d 84	40
Carroll v. *United States*, 354 U.S. 394	21, 26

362-689—69——1

Cases—Continued

	Page
Case v. *United States*, 14 F. 2d 510	40
Clark v. *United States*, 109 Ct. Cl. 444, certiorari denied, 333 U.S. 833	36
Crane, Ex parte, 5 Pet. 190	17, 23
DeBeers Consolidated Mines, Ltd. v. *United States*, 325 U.S. 212	22, 31
Federal Trade Commission v. *Dean Foods Co.*, 384 U.S. 597	31
Gladstein v. *McLaughlin*, 230 F. 2d 762	35
Glaser, In re, 198 U.S. 171	31
Green, In re, 141 U.S. 325	21
Hennen, Matter of, 13 Pet. 230	34
Hobson v. *Hansen*, 265 F. Supp. 902 certiorari dismissed, 393 U.S. 801	33
Humphrey's Executor v. *United States*, 295 U.S. 602	33
Jimenez v. *Aristeguieta*, 311 F. 2d 547, certiorari denied, 373 U.S. 914	42
Josephson, In re, 218 F. 2d 174	24, 25
La Buy v. *Howes Leather Co.*, 352 U.S. 249	26, 34
Laughlin v. *Wheat*, 95 F. 2d 101	28, 38
Marbury v. *Madison*, 1 Cranch 137	15, 16, 21, 23, 27
Maryland v. *Soper* (No. 1), 270 U.S. 9	17, 24
Massachusetts, In re, 197 U.S. 482	31
McCardle, Ex parte, 7 Wall. 506	26
McClellan v. *Carland*, 217 U.S. 268	31
Myers v. *United States*, 272 U.S. 52	33
National Labor Relations Board, In re, 304 U.S. 486	24
O'Bryan v. *Chandler*, 352 F. 2d 987, certiorari denied, 384 U.S. 926	5
Occidental Petroleum Corp. v. *Chandler*, 303 F. 2d 55, certiorari denied, 372 U.S. 915	6, 35, 37
Republic of Peru, Ex parte, 318 U.S. 578	17, 27, 28, 31
Robinson, Ex parte, 19 Wall. 505	21, 27, 37
Roche v. *Evaporated Milk Association*, 319 U.S. 21	31
Siebold, Ex parte, 100 U.S. 371	33
Sniadach v. *Family Finance Corp. of Bay View*, 395 U.S. 337	38
Stephan v. *United States*, 319 U.S. 423	21, 26
Stern v. *South Chester Tube Company*, 390 U.S. 606	28
Texaco, Inc. v. *Chandler*, 354 F. 2d 655, certiorari denied, 383 U.S. 936	6, 35

Cases—Continued

	Page
Textile Mills Securities Corp. v. *Commissioner of Internal Revenue*, 314 U.S. 326	20
United States, Ex parte, 297 U.S. 241	31
United States v. *King*, 395 U.S. 1	28
United States v. *Malmin*, 272 Fed. 785	29, 30
United States v. *Ritter*, 273 F. 2d 30, certiorari denied, 362 U.S. 946	35
United States Alkali Export Ass'n, Inc. v. *United States*, 325 U.S. 196	22
Virginia v. *Rives*, 100 U.S. 313	24
Wall, Ex parte, 107 U.S. 265	21, 33, 37
Will v. *United States*, 389 U.S. 90	28
Winn, In re, 213 U.S. 458	17, 21
Yerger, Ex parte, 8 Wall. 85	17
Constitution and statutes:	
United States Constitution:	
Article I, Sections 2 and 3	33
Article II, Section 4	33
Article III	14, 16, 17, 21, 27, 33
Act of April 30, 1790, § 21, Stat. 117 (now 18 U.S.C. 201(e))	34
Act of August 7, 1939, 53 Stat. 1223, Section 302	17
Administrative Procedure Act, 5 U.S.C. 551(1)(B)	28
All Writs Act:	
28 U.S.C. 1651	4, 13, 24, 29, 31
28 U.S.C. 1651(a)	22, 25, 26
Declaratory Judgment Act, 28 U.S.C. 2201	28
First Judiciary Act, 1 Stat. 80, *et seq.*:	
Section 13	23, 25, 25, 26, 29
Section 14	23, 24, 25, 26
Judicial Code of 1911, 36 Stat. 1090:	
Section 23 (28 U.S.C. (1940 ed.) 27	39
Section 234 (28 U.S.C. (1940 ed.) 342)	25
Section 262 (28 U.S.C. (1940 ed.) 377)	25
Revised Statutes §§ 688 and 751	25
18 U.S.C. 203(b)	34
11 U.S.C. 62(b)	46
28 U.S.C. 41	4
28 U.S.C. 42	29
28 U.S.C. 137	3, 9, 10, 14, 39, 41, 50

Constitution, statutes, and regulations—Continued Page
28 U.S.C. 144 35
28 U.S.C. 332 ..... 3, 5, 6, 9, 14, 18, 20, 39, 41, 46, 48, 50
28 U.S.C. 455 35
28 U.S.C. 601 18
28 U.S.C. 604 18
28 U.S.C. 1331 28
28 U.S.C. 1361 28
28 U.S.C. (Supp. IV) 1407 (d) and (e) 22
5 U.S.C. (Supp. IV) 551(1)(B) 28
Miscellaneous:
Annals of Congress, 4th Cong., 2d Sess., col. 2320 35
Annals of Congress, 7th Cong., 1st Sess., cols. 71–72 35
Brown, *The Impeachment of the Federal Judiciary*, 26 Harv. L. Rev. 684 (1913) 36
Chandler, *Some Major Advances in the Federal Judicial System*, 31 F.R.D. 307 (1963) 18, 42
81 Cong. Rec. 6164 35
F.R. App., P., Rule 35(a) 18
Hearings on Administration of United States Courts before the House Judiciary Committee, 76th Cong., 1st Sess. (1939) 18, 42, 44, 45, 48
Hearings on Administration of United States Courts before a Subcommittee of the Senate Judiciary Committee, 76th Cong., 1st Sess. (1939) 19, 42, 43, 45, 49
Hearings on The Judicial Reform Act, S. 3055., etc., before the Senate Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, 90th Cong., 2d Sess. (1968) 36, 37
Hearing on S. 1506 before the Senate Judiciary Subcommittee on Improvements in Judicial Machinery, 91st Cong., 1st Sess. (held in June 1969) 36
3 Hinds, *Precedents of the House of Representatives*, p. 982, American State Papers (Misc.), Vol. 1, p. 151 35
H. Rep. No. 814, 75th Cong., 1st Sess 36
H. Rep. No. 702, 76th Cong., 1st Sess. (1939) 19
H. Rep. 921, 77th Cong., 1st Sess 36
Mason, *William Howard Taft; Chief Justice* (1965) 42
Moore, *Judicial Trial and Removal of Federal Judges*, 20 Texas L Rev. 352 (1942) 36
Note, *The Exclusiveness of the Impeachment Power under the Constitution*, 51 Harv. L. Rev. 330 (1937) 20, 36

Miscellaneous—Continued

Page

Note, 22 Mass. L. Quar. 52 (July–Sept., 1937)..... 36
Note, *Trial of Good Behavior of Federal Judges*, 29 Va. L. Rev. 876 (1943)..... 36
Otis, *A Proposed Tribunal: Is it Constitutional?* 7 Kansas City L. Rev. 3 (1938)..... 36
Report on the Powers and Responsibilities of the Judicial Councils, H. Doc. No. 201, 87th Cong., 1st Sess. (1961)..... 45, 46, 48
Ross, *"Good Behavior" of Federal Judges*, 12 Kansas City L. Rev. 119 (1944)..... 36
S. Rep. No. 426, 76th Cong., 1st Sess. (1939)..... 19, 42, 43
Shafroth, *Modern Developments in Judicial Administration*, 12 Am. U. L. Rev. 150 (1963)..... 18, 41, 46
Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 Mich. L. Rev. 485, 723, and 870 (1930)..... 23, 34, 36
Sumners, *Bill H.R. 146*, 13 Pa. Bar Ass'n Quar. 150 (1942)..... 36
Tydings, *The Congress and the Courts: Helping the Judiciary to Help Itself*, 52 A.B.A.J. 321 (1966)..... 37

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OPINIONS BELOW

None of the orders and minute entries of the Judicial Council of the Tenth Circuit has been reported as a judicial opinion. The order dated December 13, 1965, is set out in the Appendix to the petition for a writ of prohibition and/or mandamus at pp. i-iii. The order is reprinted at pp. 5–7 of the Memorandum filed on

* The Solicitor General has determined, pursuant to 28 U.S.C. (Supp. IV) 516 and 518, that since federal officers are both the petitioner and the respondent in this case, the United States should appear as *amicus curiae*, not as counsel for either party.

behalf of the Respondent in February 1966. The order of February 4, 1966, apportioning the judicial business of the District Court for the Western District of Oklahoma will be found at pp. 10–16 of that Memorandum. Judge Chandler's letter of August 28, 1967, proposing that the district judges certify that no change in the disposition of business was called for, is appended to the Motion to Advance. The district judges' certification to that effect is also contained in the appendix to the Motion to Advance. The minute entry from the Council's meeting on September 14, 1967, finding no further action necessary or appropriate at that time, is on file with the Clerk of this Court.

JURISDICTION

Petitioner alleges that this Court has jursidiction under the All Writs Act, 28 U.S.C. 1651(a), to entertain his petition for relief in the nature of mandamus and/or prohibition, directed to the Judicial Council of the Tenth Circuit. Since the cause is presently before the Court on petitioner's motion for leave to file his petition, and since jurisdiction to act on the petition is not free from doubt, we have briefed this jurisdictional issue as a distinct question presented.

QUESTIONS PRESENTED

1. Whether this Court has constitutional jurisdiction and statutory authority to entertain, in the first instance, an application for an extraordinary writ to review the determinations of a circuit judicial council.

2. Whether the determinations made by the Judicial Council of the Tenth Circuit regarding the judicial business to be assigned to petitioner as a district judge were authorized by statute and consistent with the Constitution.

STATUTES INVOLVED

The Judicial Code, 28 U.S.C., provides in pertinent part:

> § 137. Division of business among district judges
>
> The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.
>
> The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.
>
> If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.
>
> § 332. Judicial councils
>
> The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.
>
> The council shall be known as the Judicial Council of the circuit.

362-689—69——2

The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

* * * * *

STATEMENT

In applying for leave to file a petition for a writ of mandamus and/or prohibition, petitioner seeks to challenge the statutory basis and the constitutional authority for the determinations made by the respondent, the Judicial Council of the Tenth Circuit, with respect to petitioner's activities as a district judge.

1. Petitioner, the Honorable Stephen S. Chandler, was duly appointed a United States District Judge for the Western District of Oklahoma in 1943, and he has served in that capacity ever since, including a number of years as chief judge of the district.

The Western District of Oklahoma is part of the Tenth Circuit. See 28 U.S.C. 41. By virtue of 28

U.S.C. 332, the circuit judges of a circuit are constituted as the Judicial Council for that circuit, with authority to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." District judges, the statute provides, "shall promptly carry into effect all orders of the judicial council."

On December 13, 1965, the Judicial Council of the Tenth Circuit, with the exception of Chief Judge Alfred P. Murrah who has disqualified himself from participation in these proceedings, convened in "special session" at Denver, Colorado. With the concurrence of four of the five circuit judges present the Council adopted an "order" (Pet. App. i–iii) which recited that:

> [i]n the past four years the Judicial Council at many meetings has discussed and considered the business of the United States District Court for the Western District of Oklahoma and has done so with particular regard to the effect thereon of the attitude and conduct of Judge Chandler who, as Chief Judge of that District, is primarily responsible for the administration of such business. * * *

The order noted that Judge Chandler had been a party defendant in both civil and criminal litigation [1] and had twice been before the court of appeals on applications to order him disqualified to handle certain

[1] See *O'Bryan* v. *Chandler*, 352 F. 2d 987 (C.A. 10) (*en banc*), certiorari denied, 384 U.S. 926; and Pet. App. xii-xiv, respectively.

litigation.[2] On the basis of the "entire situation", the Council found that "Judge Chandler is presently unable, or unwilling, to discharge efficiently the duties of his office" and that a change in the assignment of business was therefore necessary for "the effective and expeditious administration of the business" of the district court. Invoking its powers under 28 U.S.C. 332, the order accordingly directed that:

> until the further order of the Judicial Council, the Honorable Stephen S. Chandler shall take no action whatsoever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma; that all cases and proceedings now assigned to or pending before him shall be reassigned to and among the other judges of said court; and that until the further order of the Judicial Council no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for any action whatsoever.
>
> It is further ORDERED that in the event the active judges of the United States District Court for the Western District of Oklahoma, including Judge Chandler, cannot agree among themselves upon the division of business and assignment of cases made necessary by this

---

[2] In both cases, including one decided after the signing of the instant order, writs of mandamus were issued against Judge Chandler. See *Occidental Petroleum Corp.* v. *Chandler*, 303 F. 2d 55 (C.A. 10) (*en banc*), certiorari denied, 372 U.S. 915; and *Texaco, Inc.* v. *Chandler*, 354 F. 2d 655 (C.A. 10) (*en banc*), certiorari denied, 383 U.S. 936.

> order, the Judicial Council, upon such disagreement being brought to its attention, will act under 28 U.S.C. § 137 and make such division and assignment as it deems proper.

Pursuant to the Council's direction, duplicate original copies of the order were "filed" by the clerks of the Court of Appeals for the Tenth Circuit and of District Court for the Western District of Oklahoma on December 27 and 28 respectively; a certified copy of the order was to be sent to the United States Marshal for that district for service upon Judge Chandler.

2. On January 6, 1966, petitioner filed with this Court his motion for leave to file a petition for a writ of mandamus and/or prohibition directed to the Judicial Council, and sought a stay of its order. Solicitor General Thurgood Marshall, "appearing on behalf of the Judicial Council," opposed the stay application, on the basis of the Council's representation "that the order of December 13 was intended to be temporary only, pending prompt further proceedings inquiring into the administration by Judge Chandler of judicial business in the Western District of Oklahoma." Accepting this assurance that the council's order was "entirely interlocutory in character pending prompt further proceedings," this Court on January 21, 1966, denied the stay application. 382 U.S. 1003.

In February 1966, Solicitor General Marshall submitted a Memorandum for Respondent suggesting that the case had become moot. This contention was based on certain intervening developments: On January 27, 1966, the Council had again convened in special ses-

sion, and, taking note of Judge Chandler's appearance before this Court and the Solicitor General's representations in opposition to the stay application, ordered the matter set for a hearing on February 10 in Oklahoma City, when and where Judge Chandler could appear in person and with counsel to "present such matters to the Council as he may deem fit" (Resp. Mem. pp. 5–7). Judge Chandler, however, advised the Council that he would not attend the hearing. In addition, the Memorandum pointed out, by letter dated January 24 (Resp. Mem. pp. 8–9), Judge Chandler had indicated to his colleagues on the district court that he agreed with the portion of a draft order prepared by them to the effect that no cases filed after December 28, 1965, would be assigned to him, but disagreed as to the proposal to reassign cases that were theretofore pending before him, over which he asserted continuing authority. These facts were communicated to the Council in a letter and an agreement and order signed by the other district judges on January 25, 1966. The Council reconvened on February 4. Finding that no district judge wished to be heard at the scheduled hearing, the Council concluded that it would serve no purpose and vacated the order for it. On the basis of Judge Chandler's letter, the agreement and order of the district judges, and its information about the state of business in the Western District (information from the files of the Clerk, from the Administrative Office of the United States Courts, and from its own continuing review of cases from the district), the Council found that a

disagreement existed as to the division of business warranting the exercise of its powers under 28 U.S.C. 137 and 332 to provide for the "effective and expeditious administration" of justice. The Council thereupon entered an order allowing Judge Chandler to continue to sit on cases filed and assigned to him prior to December 28, 1965, but apportioning subsequent cases, on a stated proportion by lot, among the remaining judges. The order "supersede[d]" the order entered on December 13, 1965, and was to remain in force pending further order of the Council, except that the division and assignment could be amended by written order of all the active district judges of the district (Resp. Mem. pp. 10–16).[3]

In his Reply Brief, Judge Chandler disputed the suggestion of mootness, stating that he had declined the offer of a hearing because he challenged the "very jurisdiction" (p. 3) of the Council. He also denied that the division of business had been settled to everyone's satisfaction by the intervening orders of the district judges and the Judicial Council. Rather, he contended, he had merely acquiesced, for reasons of "strategy" (p. 4), in the post-December 28 assignment proposal, in order to forestall a disagreement which would have given the Council clear power to act under 28 U.S.C. 137; any disagreement as to previously assigned cases, he argued, did not fall within

[3] Judge Lewis, who had not joined in the December 13 order, concurred on the basis of his view that the authority for the new order was "clearly contained" within 28 U.S.C. 137 and 332.

the compass of Section 137, on the ground that that statute only extends to newly filed cases.

In a Supplemental Memorandum for the Respondent, it was conceded that, in light of Judge Chandler's subsequently expressed disagreement with the February 4 order, and its relationship to the order of December 13, the case had not become moot. In that Memorandum (p. 3) the Council expressed its continuing belief that it was "advisable that Judge Chandler substantially dispose of his pending docket before undertaking the assignment of new judicial business".[4] The Memorandum continued (*ibid.*):

> At such time in the future as Judge Chandler certifies to the Council that he has substantially disposed of the business before him which is ready for disposition, and that he is willing and able to undertake new business, the Council will consider the modification of the present order to permit such business to be assigned to Judge Chandler. The Council believes that its present order, thus withholding the assignment of new business to Judge Chandler until his current docket is significantly reduced, is clearly authorized by 28 U.S.C. 137 and 322.

It was recommended that the petition be denied or retained on the docket until the Council acted on any future certification of willingness and ability to undertake new assignments.

Later in March, Judge Chandler submitted a Reply to that Supplemental Memorandum, asserting that the

[4] Judge Chandler had a backlog of approximately 160 cases at the time.

Council was continuing to act beyond its authority by purporting to require that he certify to it his subsequent willingness and ability to undertake new business. He contended that the Supplemental Memorandum setting forth the Judicial Council's position on this point was in effect a fourth order of the Council fixing still another condition on the exercise of his judicial office. He indicated that he would refuse to comply with this suggested procedure, since he continued to believe the Council was without authority in the matter and since he was attempting to litigate that very issue.

3. No further action was taken until the Summer of 1967. In June 1967, the Clerk of this Court wrote to the parties to ask them to keep him apprised of any further developments in the case. On July 12, 1967, the Judicial Council of the Tenth Circuit convened, and in light of a report showing that Judge Chandler had only twelve cases pending, concluded that a modification of its order of February 4, 1966, might be in order (Resp. Chronology of Events, p. 6). Circuit Judge Lewis thereafter transmitted to the district judges involved a copy of the minutes of the meeting whereby they were asked to consider anew and agree upon a division of business.

By letter of August 28, 1967, circulated among his colleagues (Motion to Advance, App.), Judge Chandler recounted the prior events in the controversy and charged that the Judicial Council's July request constituted another "illegal effort" to produce a situation wherein the Council could assert authority under 28

U.S.C. 137 to apportion the district court's business. He noted that his prayer for relief from this Court was still pending, and recommended that it would not be "proper to disturb the status quo while the case rests in the bosom of that Court."

On September 1, 1967 (Motion to Advance, App.), all of the district judges of the Western District of Oklahoma signed a letter addressed to the Judicial Council stating that "under the circumstances" the "current order for the division of business in this district is agreeable." The Tenth Circuit Judicial Council reconvened on September 14, 1967, took note of this unanimous certification by the district judges, and concluded that "no action of the Council is either necessary or appropriate at this time." The "Clerk of the Judicial Council" was directed to send a copy of the minutes to that effect to the Clerk of this Court, and the Clerk of the Court of Appeals for the Tenth Circuit did so under covering letter dated September 18, 1967.

4. There were no further developments until Judge Chandler filed a Motion to Advance in June 1969. It was in that posture that the Court, on June 16, 1969, while denying the motion to advance, set the cause for oral argument at the beginning of the 1969 Term.

SUMMARY OF ARGUMENT

I.

This Court has jurisdiction to entertain the petition for a writ of mandamus or prohibition.

At least when its orders are directed to a District Judge to regulate the exercise of his official duties, a Judicial Council is acting as a judicial tribunal for purposes of this Court's appellate jurisdiction under Article III of the Constitution. The judicial character of the councils established as Judicial Councils was an indispensable ingredient in their creation. A Judicial Council is no more and no less than the court of appeals for the particular circuit sitting *en banc*.

This Court possesses sufficient statutory authority to entertain the petition for an extraordinary remedy. Congress has not expressly provided for review of orders of Judicial Councils; and we are aware of no case holding that this Court has inherent power, apart from some statutory predicate, to review the actions of lower courts or tribunals. Examination of the history of the All Writs Act shows that it does provide a sufficient basis for this Court's exercise of appellate jurisdiction in a situation such as this. The actions which Judge Chandler protests sufficiently affect matters within this Court's appellate jurisdiction so as to bring his application for extraordinary relief within the All Writs Act.

II.

In the present posture of the case, the petitioner is not entitled to any relief. The initial order of the Council which evoked his recourse to this Court was long ago vacated and has been replaced by orders clearly within the Council's authority.

The assignment order currently in effect is within the lawful authority of the Judicial Council. That order rests on both 28 U.S.C. 137 and 332. These statutory provisions were carefully prepared and enacted by Congress on the recommendation of the Judicial Conference of the United States, for the purpose of assisting the judges to keep their own house in order. These provisions are valid congressional responses to the need for the federal courts to maintain themselves as effective and trustworthy instruments of justice.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO ENTERTAIN THE PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

The threshold question that must be considered is whether this Court possesses the potential capacity under Article III of the Constitution to entertain Judge Chandler's direct application for extraordinary relief from the determinations by the Judicial Council of the Tenth Circuit. If so, the jurisdictional inquiry must decide whether specific statutory authority is necessary for the exercise of such power and whether such authority presently exists. Both branches of this inquiry will illustrate that the Court's jurisdiction over this matter is far from clear, but it is the position of the United States that the Court does possess the requisite jurisdiction to pass upon Judge Chandler's contentions.

A. AT LEAST WHEN ITS ORDERS ARE DIRECTED TO A DISTRICT JUDGE TO REGULATE THE EXERCSE OF HIS OFFICIAL DUTIES, A JUDICIAL COUNCIL IS ACTING AS A JUDICIAL TRIBUNAL FOR PURPOSES OF THIS COURT'S APPELLATE JURISDICTION UNDER ARTICLE III OF THE CONSTITUTION

In dissenting from the denial of Judge Chandler's application for a stay of the Judicial Council's order of December 13, 1965, two members of this Court characterized the Council as simply a "governmental agency" entrusted only "with limited *administrative* powers." 382 U.S. 1003, 1005 (emphasis in original). If that characterization is accurate, this Court has no jurisdiction under the Constitution to pass upon Judge Chandler's petition. No further authority would be needed to sustain this conclusion than *Marbury* v. *Madison,* 1 Cranch 137.

In *Marbury,* it will be remembered, the petitioner had been appointed a justice of the peace in the District of Columbia, but the new Administration refused to deliver to him his previously signed commission. Applying directly to this Court for a writ of mandamus to compel the Secretary of State to deliver the commission, Marbury invoked Section 13 of the Judiciary Act of 1789 which by its terms conferred on this Court (and only on this Court) the "power to issue * * * writs of *mandamus,* in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." Chief Justice Marshall's classic opinion concluded, however, that insofar as this statute sought to confer power to entertain proceedings against federal *officers* in the first instance, it was

void as inconsistent with the command of Article III that, except in a few defined situations, this Court's jurisdiction is in "all other cases" to be appellate.

But Marshall was quite careful to note that in regulating the Court's *appellate* jurisdiction, Congress could provide any mode it chose for the Court to exercise whatever aspects of its potential "appellate" jurisdiction Congress elected to authorize. What was viewed as critical, the opinion makes clear, is not the form of action, but whether in substance it is the beginning of a *new* lawsuit brought to the courts for the first time or is instead the continuation of a judicial controversy—including an application for *de novo* reexamination of what a lower court has done. Marshall's analysis is pertinent here (1 Cranch at 175-176):

> To enable this court, then, to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them [sic] to exercise appellate jurisdiction. * * * It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet to issue such a writ to an officer, for the delivery of a paper, is, in effect, the same as to sustain an original action for that paper, and therefore, seems not to belong to appellate, but to original jurisdiction.

As the Court later explained in awarding a writ of mandamus, the authority conferred by the First Judiciary Act to issue writs of mandamus to inferior *courts* of the United States *is* a manifestation of "appellate" power because in such circumstances the writ "is for the purpose of revising and correcting proceedings in a case already instituted in the court * * *." *In re Winn,* 213 U.S. 458, 465–466. See, also *Ex parte Crane,* 5 Pet. 190, 193 (Marshall, C. J.); *Ex parte Yerger,* 8 Wall. 85, 103; *Maryland* v. *Soper* (*No. 1*), 270 U.S. 9, 28; *Ex parte Republic of Peru,* 318 U.S. 578, 582–583.

The key question, therefore, is whether a judicial council is, for these purposes, a "lower court" or "inferior tribunal" whose decisions are reviewable in the exercise of this Court's appellate jurisdiction, rather than an administrative agency whose personnel happen also to serve as circuit judges. In our view, at least insofar as a Council is acting to direct the conduct of judicial business by district judges, it is functioning both in form and in substance as a judicial tribunal within the compass of Article III.

No extended discussion of the powers and functions of a Judicial Council is necessary at this juncture, since that subject must be developed fully below in connection with the examination of what the Tenth Circuit Judicial Council has done in this matter. It should be sufficient to note that the judicial character of the councils bearing that description was an indispensible ingredient in their creation. The entity known as a "Judicial Council" was created by Section 302 of

the Act of August 7, 1939, 53 Stat. 1223, relating as a whole to the "Administration of the United States Courts." That act created the Administrative Office of the United States Courts, as part of the judicial branch, to provide support services for the courts and to collect, analyze, and disseminate to them statistics on judicial administration. See 28 U.S.C. 601, 604. But the Director of the Administrative Office, who is appointed by this Court, was entrusted with no authority over the performance of judicial business. For this purpose the Act created the judicial councils, with the responsibility for considering his reports on the dispatch of judicial business and with the power to make determinations, binding on district judges, for resolution of any impediments to proper court functioning.

A judicial council is no more and no less than the court of appeals for the particular circuit sitting *en banc*. Compare 28 U.S.C. 332 with F.R. App. P., Rule 35(a). See Shafroth, *Modern Developments in Judicial Administration,* 12 Am. U.L. Rev. 150, 157 (1963); (Henry P.) Chandler, *Some Major Advances in the Federal Judicial System,* 31 F.R.D. 307, 384 (1963). The decision to "center the responsibility [for judicial administration] upon the personnel who constitute the Circuit Court of Appeals" [5] was made to place "the responsibility for judicial administration where it be-

[5] *Hearings on Administration of United States Courts before the House Judiciary Committee*, 76th Cong., 1st Sess., 21 (1939) (hereafter, *House Hearings*).

longs—with the judiciary * * *."[6] Chief Justice Groner of the United States Court of Appeals for the District of Columbia, who had been appointed by Chief Justice Charles Evans Hughes as chairman of the committee of circuit judges that took an active part in drafting the bill, explained to the Senate Committee that no "administrative officer" was given "any supervision or control over the exercise of purely judicial duties":[7]

> To create such [an] office would be to destroy the very fundamentals of our theory of government. The administrative officer proposed in this bill is purely an administrative officer. * * * It is his duty to observe and see that whatever is wrong in the administration of justice, from whatever sources it may arise, *is brought to the attention of the judicial council that it may be corrected, by the courts themselves.* That is, as I respectfully suggest, as it ought to be.[8]

The bill as originally enacted made it the duty of district judges to comply with the "directives" of the Council, and in the 1948 Revision of the Judicial Code a change in "phraseology" amended this mandatory language to provide that "district judges shall

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[6] H. Rep. No. 702, 76th Cong., 1st Sess., p. 4 (1939).

[7] *Hearings on Administration of United States Courts Before a Subcommittee of the Senate Judiciary Committee*, 76th Cong., 1st Sess., p. 12 (1939) (hereafter *Senate Hearings*) (question by Senator Hatch).

[8] *Senate Hearings*, pp. 12–13 (emphasis added). See, also, S. Rep. No. 426, 76th Cong., 1st Sess., p. 4 (1939).

362-689—69——4

promptly carry into effect all *orders* of the judicial council." 28 U.S.C. 332 (emphasis added). The substance of what judicial councils are indisputely authorized to do—in some manner "direct" or "order" district judges to carry out certain measures—demonstrates, as the legislative history shows Congress understood, that the councils were regarded, consonant with traditional notions of separation of powers, as judicial entities.[9]

Review of such "orders" or "directives" comports with the dual limitations that this Court pass only upon "cases or controversies," within its "appellate jurisdiction". This is so at least where, as in this case, the orders have the purpose and effect of limiting a district judge's performance of judicial duties and he alleges illegal interference with the exercise of his office. Direct judicial supervision of the efficiency and responsibility with which a subordinate judge performs his duties can be analogized to a disbarment proceeding or order for purposes of the constitutional reference to "cases" and "controversies",[10] since in both instances a tribunal is controlling the individual's authority to participate in the judicial process. Similarly, this Court has often held that it can issue writs of mandamus in the exercise of its appellate jurisdiction to review and revise the action of inferior

[9] Courts of appeals, as courts, exercise a variety of functions other than hearing appeals from district courts and administrative agencies. See *Textile Mills Securities Corp.* v. *Commissioner of Internal Revenue*, 314 U.S. 326, 332.

[10] See Note, *The Exclusiveness of the Impeachment Power Under the Constitution*, 51 Harv. L. Rev. 330, 334 (1937).

federal courts disbarring an attorney. See, *e.g.*, *Ex parte Bradley*, 7 Wall. 364; *Ex parte Robinson*, 19 Wall. 505; *Ex parte Wall*, 107 U.S. 265.

Thus, assuming that a Judicial Council—generally, or at least when issuing orders regulating the official activities of district judges—is a "lower court" or "inferior tribunal" within the meaning of *Marbury* v. *Madison* and later cases, this Court has the constitutional capacity to entertain Judge Chandler's petition in the exercise of its appellate jurisdiction.

B. THIS COURT POSSESSES SUFFICIENT STATUTORY AUTHORITY TO ENTERTAIN THIS PETITION FOR AN EXTRAORDINARY REMEDY

The somewhat more questionable aspect of this Court's jurisdiction to hear Judge Chandler's prayer for relief involves the search for statutory authority to exercise what we believe we have shown is the potential appellate jurisdiction allowed by Article III. The clause of Article III conferring appellate jurisdiction subject to regulation by Congress has always been understood to mean that the exercise of jurisdiction generally permitted to this Court by the Constitution is dependent upon some affirmative legislative action authorizing it. Thus, whatever the mode of asserting appellate jurisdiction that a litigant may invoke—including mandamus—relief can be granted only when statutory authority for entertaining the suit can be found. Compare *In re Winn*, 213 U.S. 458, 466, with *In re Green*, 141 U.S. 325, 326–327. See, also, *Stephan* v. *United States*, 319 U.S. 423, 426; *Carroll* v. *United States*, 354 U.S. 394, 399.

In his Motion for Leave to File, Judge Chandler invokes as a premise for jurisdiction not only the All Writs Act, 28 U.S.C. 1651(a), but also calls upon "the Court's inherent powers" (p. 4). We are aware of no case holding that this Court has "inherent power", apart from some statutory predicate, to review the action of lower courts. Congress has not expressly provided for review of the orders of Judicial Councils.[11] And the extent to which the All Writs Act furnishes necessary statutory support for jurisdiction is unclear, because in all prior cases, including those cited by petitioner,[12] in which this Court has relied on that statute to issue an extraordinary writ "in aid of its jurisdiction", what was involved was a *particular* lawsuit that would otherwise have come within the Court's statutory review jurisdiction, although at a later stage. By contrast, Judge Chandler bases his reliance upon this statute on the theory that the action of the Judicial Council "touches, through Judge Chandler's fate, hundreds of cases over which this Court has appellate or review jurisdiction." (Pet. 13) To test the permissibility of this expansive use of the All Writs Act, we believe it would be useful to con-

[11] When Congress created a hybrid "judicial panel on multidistrict litigation," composed of seven circuit and district judges, to coordinate similar suits filed in different districts, it expressly addressed itself to the question of further review, and authorized review by the court of appeals of the transferee district under the All Writs Act. See 28 U.S.C. (Supp. IV) 1407 (d) and (e).

[12] *United States Alkali Export Ass'n, Inc.* v. *United States*, 325 U.S. 196; *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (both cases: common law writs of certiorari in antitrust cases over which this Court had exclusive direct appellate jurisdiction after final judgment).

duct a brief analysis of the historical development of this Court's power to issue extraordinary writs.

In 1789, the First Judiciary Act was passed, and it contained two distinct sections dealing with the issuance of extraordinary writs, Sections 13 and 14, 1 Stat. 80–82. Section 13, which was involved in *Marbury* v. *Madison,* conferred upon this Court, and only on this Court, the "power to issue * * * writs of *mandamus,* in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." In light of the historical antecedents of that statute and its interpretation in subsequent decisions, we would have no doubt that it encompassed the type of review for which Chandler presses—but it may have been effectively repealed.

In Ex parte Crane, Chief Justice Marshall, after pointing to Section 13, explained that under a comparable New York statute the state court (5 Pet. at 194):

> possesses the power to issue this writ [of mandamus], in virtue of its general superintendance of inferior tribunals. No other tribunal exists by which it can be exercised.

The responsibility entrusted and accepted was clearly patterned on the "supervisory authority" exercised by the Court of King's Bench in England over the conduct of inferior courts and judges.[13] As Chief Judge Magruder noted after analyzing the experience

[13] See Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution,* 28 Mich. L. Rev. 723, 731 (1930).

judiciary act confers the power expressly on this court.

under Section 13 (*In re Josephson,* 218 F. 2d 174, 178 (C.A. 1)):

> After *Marbury* v. *Madison,* the Supreme Court continued to recognize that * * * Section 13 of the Judiciary Act of 1789 was still good to authorize that Court to exercise the essentially appellate function of reviewing and revising a judicial proceeding in a lower court by appropriate use of the common-law writ of mandamus, whether or not it had been given by Congress some other statutory appellate jurisdiction, or potential appellate jurisdiction, by way of an appeal or writ of error or otherwise. * * *

See, *e.g., Virginia* v. *Rives,* 100 U.S. 313, 323–324; *Maryland* v. *Soper* (*No. 1*), 270 U.S. 9, 30; *In re National Labor Relations Board,* 304 U.S. 486, 496.

Section 14 of the Judiciary Act of 1789, by contrast, is the predecessor of the All Writs Act, and was distinctly viewed as an ancillary provision designed to supplement the fulfillment of separately conferred jurisdiction by providing an open-ended category of remedies; it provided that this Court *and other* Federal courts were to have:

> power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

Sections 13 and 14 of the First Judiciary Act retained their independent identity over the years[14] until the revision of the Judicial Code in 1948. At that time, they were repealed in favor of the All Writs Act, 28 U.S.C. 1651(a), which, it was said by the Reviser, "consolidates" the sections. Nevertheless, because the note also explained that the "special provisions" that had been carried forward from Section 13 "were omitted as unnecessary in view of the revised section," there has been some interpretation indicating that this change was meant to, and did, withdraw the unique supervisory power which had theretofore been entrusted to this Court alone, so that thenceforth, this Court, as will all other federal courts, may issue only those extraordinary writs that may be "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Judge Magruder in the *Josephson* case *supra,* 218 F. 2d at 179, noting that the Reviser's Note termed this Court's special statutory power "unnecessary" in light of the clarification of the "all-writs" provision as extending to *all* federal courts, concluded:

> Thus, it seems that since 1948 Congress has withdrawn from the Supreme Court its special appellate power to supervise proceedings in the lower federal courts by means of the writ of mandamus; so that all federal courts, including the Supreme Court, are now limited to the is-

[14] They were codified respectively as Rev. Stat. §§ 688 and 751 and then as Sections 234 and 262 of the Judicial Code of 1911 (28 U.S.C. (1940 ed.) 342 and 377).

> suance of "all writs necessary or appropriate in aid of their respective jurisdictions."

Apparently accepting this analysis, Justice Brennan's dissenting opinion (joined by Justices Frankfurter, Burton, and Harlan) in *La Buy* v. *Howes Leather Company,* 352 U.S. 249, 260, 265–266, argued that the Court's pre-1948 opinions supporting the issuance by this Court of writs of mandamus to lower courts could not fairly be relied on as suggesting similar authority for courts of appeals to proceed under the All Writs Act; Section 13, the dissent pointed out,

> unlike the All Writs Act, *was* not restricted in its use to aiding the jurisdiction of the appellate court, and therefore might be deemed *to have granted* a broader power to this Court than that conferred on the Courts of Appeals by the latter statute. [Emphasis added.] [15]

While Congress undoubtedly had the power to cut back on this Court's appellate jurisdiction, we believe that such an intention should not lightly be inferred. Compare *Carroll* v. *United States,* 354 U.S. 394, 411–415; *Stephan* v. *United States,* 319 U.S. 423, 426; *Ex parte McCardle,* 7 Wall. 506, 512. The relevant material surrounding the 1948 codification is quite consistent with the conclusion that the special power conferred by Section 13 in 1789 is now simply merged with the authority that all federal courts, including this Court, possess to issue writs in aid of their jurisdiction. The Reviser's Note explains that the new Section 1651(a) makes "explicit the right to exercise

[15] This point was not discussed by the majority.

powers implied from the creation of such courts." This Court, specifically created by Article III of the Constitution to be "supreme", may properly conclude that the explicit authority uniquely conferred by Congress in 1789 in light of its special status was not withdrawn either deliberately or accidentally in 1948.

A number of sound principles support this conclusion. First, it is a fundamental principle of Anglo-American law, recognized by this Court at least as long ago as *Marbury* v. *Madison,* that every right demands a remedy; in *Marbury,* for example, the Court concluded that the office of justice of the peace, a position of trust, honor, and profit, surely had to be subject to the protection of the law. See 1 Cranch at 163. Second, Judge Chandler, who asserts that the Judicial Council has illegally exceeded its bounds by interfering with the exercise of his judicial office, has undoubtedly selected the proper remedy, a writ in the nature of mandamus. Mandamus is the proper remedy

> when the case is outside of the exercise of this [judicial] discretion, and outside the jurisdiction of the court * * * to which * * * the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds. [*Virginia* v. *Rives,* 100 U.S. 313, 323–324.]

Accord, *Ex parte Republic of Peru,* 318 U.S. 578, 582–583. This concept extends to use of a writ of mandamus, either issued by this Court, *e.g., Ex parte Robinson,* 19 Wall. 505, 512; *Ex parte Bradley,* 7 Wall. 364, 375–376, or by an intermediate appellate court,

e.g., Laughlin v. *Wheat,* 95 F. 2d 101 (C.A. D.C.), as the proper remedy for reviewing the action of a court in disciplining an attorney or conditioning the exercise of his office.

But if Judge Chandler cannot resort to this Court for scrutiny of what he contends were the lawless excesses of the Judicial Council, he will be without any practical remedy. It requires no extended discussion to point out that no serious or appropriate remedy could be sought from the district court or from the court of appeals itself.[16] While it is axiomatic that necessity cannot create jurisdiction, *Ex parte Republic of Peru, supra,* 318 U.S. at 583–584 n. 3, cf. *Will* v. *United States,* 389 U.S. 90, 97, this consequence can permissibly illuminate the inquiry whether Congress

[16] Apart from the anomolous conflict that would exist if a district judge were called upon to pass directly upon the lawfulness of the action of circuit judges, it is doubtful whether there are any statutes Judge Chandler could invoke to bring his grievances into a district court. The federal-question statute, 28 U.S.C. 1331, contains a jurisdictional-amount limitation; Judge Chandler's salary is unaffected by the Council's orders, and it is doubtful that he could assert or establish that the "matter in controversy" exceeds $10,000. Cf. *Stern* v. *South Chester Tube Company,* 390 U.S. 606. The district court mandamus statute, 28 U.S.C. 1361, extends to officers, employees, and agencies of the United States, but probably does not include other tribunals. There is no plausible basis for invoking an ancillary statute like the All Writs Act, since the relief would not be "in aid of" the district court's jurisdiction. The Declaratory Judgment Act, 28 U.S.C. 2201, applies only where the court would otherwise have jurisdiction over the matter. See *United States* v. *King,* 395 U.S. 1. And the Administrative Procedure Act, which is not generally thought to be an independent source of jurisdiction, excludes from the scope of the agencies to which it applies "the courts of the United States." 5 U.S.C. (Supp. IV) 551(1)(B).

has left a substantial lacuna in the statutory scheme for litigating substantial legal claims. See *Ex parte Bradley,* 7 Wall. 364, 376, holding that disbarment proceedings, which would not support a writ of error, were reviewable upon mandamus under Section 13 of the Judiciary Act because some flagrant abuses might otherwise go uncorrected. Mandamus, the Court explained, may be awarded directly "in the supervision of the proceedings of inferior courts, in cases where there is a legal right, without any existing legal remedy." *Ibid.*

The one case that research has uncovered bearing most directly on this point supports Judge Chandler's reliance upon the All Writs Act. In *United States* v. *Malmin,* 272 Fed. 785 (C.A. 3), the United States, as sovereign, filed with the Circuit Court of Appeals for the Third Circuit—which then as now (28 U.S.C. 42) had review jurisdiction over the federal courts in the Virgin Islands—a petition for a writ of mandamus to compel the respondent, a judge of the district court there, to return to the Virgin Islands to resume the exercise of his judicial office. The territorial governor had purported to replace Judge Malmin and the judge had acquiesced in the removal, which the United States believed was *ultra vires* and void. The government rested its application for the writ upon the predecessor to the All Writs Act; mandatory relief was sought in order that (272 Fed. at 788):

> the purposes of his appointment shall be fulfilled by the completion of cases formally begun before him and in order also that parties liti-

> gant may have their cases heard before the only judge warranted by law to hear and finally dispose of them, to the end that, if aggrieved by final judgments, they have had opportunity, under the laws of the United States, to apply to this appellate court for review of the same * * *.

The court agreed that it had authority under the statute to issue the writ "in aid of" its jurisdiction, explaining (272 Fed. at 792):

> The appellate jurisdiction of this court does not arise from prior invocation alone; it is continuously existent. Matters which disturb that jurisdiction, either before or after it is invoked, are, therefore, cognizable here. If the absence of a lawfully appointed judge of a District Court, from which appeals lie to this court, thereby affects the right of litigants to take appeals and the right of this court to entertain them, confessedly this court has power to restore the orderly proceedings of the trial court by commanding the absent judge to return and transact its business.

On the merits, the court agreed that the judge's removal was ineffective. "Therefore", the court explained, "it becomes essential to the appellate jurisdiction of this court that orderly proceedings in the District Court of the Virgin Islands be restored" (*ibid.*), and a peremptory writ of mandamus issued.

In the present case, it is the Judge himself who is complaining of illegal interference with the exercise of his office, and his interest supplements those of the litigants before the district court in demonstrating that the actions which Judge Chandler protests suffi-

ciently affect matters within this Court's appellate jurisdiction so as to bring his application for extraordinary relief within the All Writs Act. This conclusion is reenforced by the now settled understanding that an extraordinary writ may be issued when the lower court's action or inaction might defeat this Court's *eventual* jurisdiction, which could be invoked on the merits only after proceedings in an intermediate court.[17]

II. IN THE PRESENT POSTURE OF THE CASE, PETITIONER IS NOT ENTITLED TO ANY RELIEF

If the Court concludes that it has jurisdiction to entertain Judge Chandler's application for extraordinary relief from the orders issued by the Judicial Council, he has failed to make out a case on the merits for the award of such relief. The initial order of the Council which evoked his recourse to this Court was long ago vacated and has been replaced by orders clearly within the Council's authority.

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[17] See, *e.g.*, *McClellan* v. *Carland*, 217 U.S. 268 (mandamus); ***Ex parte United States*, 287 U.S. 241 (mandamus)**; *Ex parte Republic of Peru*, 318 U.S. 578 (mandamus and prohibition); *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (common-law certiorari); cf. *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597 (injunction); *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 (mandamus). These cases have limited or overruled the earlier position taken in such cases as *In re Massachusetts*, 197 U.S. 482, 488, and *In re Glaser*, 198 U.S. 171, 173, which had held that resort could be made to this Court for a writ "in aid of" its jurisdiction only when it had direct review jurisdiction over the court wherein the case was then pending.

A. THE FIRST ORDER ENTERED BY THE JUDICIAL COUNCIL, EVEN IF OBJECTIONABLE, HAS BEEN REVOKED

Judge Chandler submitted his prayer for relief shortly after he was notified that on December 13, 1965, the Judicial Council of the Tenth Circuit in closed session had prepared an order directing him to take no further part in any case or proceeding then or thereafter pending in the District Court for the Western District of Oklahoma, where he served as Chief Judge. That order, which was entered without any notice or opportunity to be heard, was based on the Council's own prior discussions of the conduct of business in that district and Judge Chandler's apparently adverse effect on it; the order also, however, recited that he had himself been a party defendant in civil and criminal litigation, including disqualification proceedings, and that the Council was convinced from all these circumstances that he was "presently unable, or unwilling, to discharge efficiently the duties of his office" (Pet. App. ii).

Judge Chandler argues that this action constituted removal from the bench, and contends that Section 332 of the Judicial Code, on which the Council had relied, does not purport to confer such power, but that if it does the statute would be unconstitutional.

In dissenting from the denial of a stay of that order, Justices Black and Douglas expressed their opinion that no statute could constitutionally authorize the circuit judges, or a Judicial Council, to "inquire into the fitness of a district judge to hold his office"; to do so, they argued, would trench upon the constitutional

responsibility of Congress under Article I, §§ 2 and 3, and Article II, §4, to exercise the power to impeach malfeasant federal officers, including federal judges. In our view, however, the Constitution would not forbid such legislation, providing for judicial trial of the fulfillment of the condition of federal judicial tenure under Article III—that the judge maintain his "good behavior." The power of impeachment—which applies to *all* federal officers, not only to federal judges—is not defined in Article III but rather embodies the sole method by which the *legislature* may *directly* remove government officials—to the exclusion, for example, of the English practice of passing bills of attainder. Thus, just as the impeachment clause does not prevent the President from removing executive officers in his own discretion, even though they are also subject to removal by Congress through impeachment, *Myers* v. *United States,* 272 U.S. 52, so also there is nothing in the Constitution to suggest that Congress cannot, consistently with the separation of powers, provide procedures by which the courts could try the right of a judge to continue to hold office. Compare *Humphrey's Executor* v. *United States,* 295 U.S. 602.[18]

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[18] See *Ex parte Wall*, 107 U.S. 265, 288:

> [T]he courts ought not to hesitate * * * to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws.

It is noteworthy that Article II, § 2, cl. 2 of the Constitution expressly authorizes Congress to entrust to "the Courts of Law" the power to appoint federal officers. See, generally, *Ex parte Siebold*, 100 U.S. 371; *Hobson* v. *Hansen*, 265 F. Supp. 902,

Nothing in this position is inconsistent with the bedrock principle of our constitutional system: the independence of the federal judiciary. The Constitution states only that federal judges shall hold office during their good behavior; necessarily implicit in this provision is that the official conduct of judges is subject to supervision and control by appropriate agencies. The first Congress in 1790 provided an alternative to impeachment for removal of federal judges: discretionary disqualification from office as part of the judgment of conviction for accepting a bribe. Act of April 30, 1790, § 21, 1 Stat. 117 (now codified as 18 U.S.C. 201 (e)). Compare 18 U.S.C. 203(b) (mandatory disqualification). Manifestly, the hierarchical judicial system contemplated by the Constitution assumes that judges of "inferior courts" are subject to the supervision and control of superior courts and are accountable to them for the performance of their duties. See, *e.g.*, *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259–260; *ACF Industries, Inc.* v. *Guinn*, 384 F. 2d 15, 20 (C.A. 5), certiorari denied, 390 U.S. 949 (mandamus may be used to exert "supervisory control" by courts of appeals over district courts). This relationship extends beyond mere review of rulings on questions of law,

911–915 (D. D.C.) (three-judge court), certiorari dismissed pursuant to Rule 60, 393 U.S. 801. This clause provides clear and direct authority for Congressionally authorized appointment of federal judges by federal judges, see Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 Mich. L. Rev. 485 (1930), a function which would necessarily carry with it implied authority to determine when the Judge should be removed, see *Matter of Hennen*, 13 Pet. 230.

and also authorizes the appellate court to pass upon the propriety and fairness of the district judge's determination that he harbored no personal bias against a litigant and possessed no personal interest in the outcome of the litigation. See 28 U.S.C. 144, 455. Indeed, on two occasions writs of mandamus have been issued against Judge Chandler himself ordering him to take no further part in cases pending before him, and in both instances this Court denied his petitions for certiorari. See *Texaco, Inc.* v. *Chandler,* 354 F. 2d 655 (C.A. 10) (*en banc*), certiorari denied, 383 U.S. 936 (relationship to counsel); *Occidental Petroleum Corp.* v. *Chandler,* 303 F. 2d 55 (C.A. 10) (*en banc*), certiorari denied, 372 U.S. 915 (personal bias).[19] It was, no doubt, in this tradition that the Judicial Conference of the United States on June 10, 1969, adopted and promulgated a prophylactic resolution limiting the outside activities of federal judges, subject to review and exception by the relevant circuit judicial councils.

There has been general agreement from the earliest times that Congress could constitutionally provide alternative procedures to impeachment, particularly judicial trials or hearings, for determining whether federal judges have abided by the requirement of good behavior.[20] And the proposed Judicial Reform Act,

[19] See, also, *United States* v. *Ritter*, 273 F. 2d 30, 32 (C.A. 10), certiorari denied, 362 U.S. 946; *Gladstein* v. *McLaughlin*, 230 F. 2d 762 (C.A. 9).

[20] See 3 Hinds, *Precedents of the House of Representatives*, p. 982, American State Papers (Misc.), Vol. I, p. 151; Annals of Congress, 4th Cong., 2d Sess., col. 2320; Annals of Congress, 7th Cong., 1st Sess., cols. 71–72; 81 Cong. Rec. 6164; H. Rep. No.

now pending before Congress, would create a Commission composed of judges assigned by the Chief Justice with power to make an effective recommendation to the President, if its judgment is sustained by this Court on review, that a judge be removed for disability or conduct inconsistent with good behavior. S. 1506, 91st Cong. See, generally, *Hearings on S. 1506 before the Senate Judiciary Subcommittee on Improvements in Judicial Machinery,* 91st Cong., 1st Sess. (held in June 1969; to be available in September).[21]

This case, however, does not appropriately raise for this Court's ultimate decision the question whether judicial panels may validly be authorized to discipline and, if necessary, to remove federal judges. All authorities agree that any such procedures would have

921, 77th Cong., 1st Sess.; H. Rep. No. 814, 75th Cong., 1st Sess.; Sumners, *Bill H.R. 146*, 13 Pa. Bar Ass'n Quar. 150 (1942). The initial and most thorough examination of the question was done by Professor Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 Mich. L. Rev. 870 (1930). See, also, Moore, *Judicial Trial and Removal of Federal Judges*, 20 Texas L. Rev. 352 (1942); Ross, *"Good Behavior" of Federal Judges*, 12 Kansas City L. Rev. 119 (1944); Note, *The Exclusiveness of the Impeachment Power under the Constitution*, 51 Harv. L. Rev. 330 (1937); Note, 22 Mass. L. Quar. 52 (July–Sep., 1937); Note, *Trial of Good Behavior of Federal Judges*, 29 Va. L. Rev. 876 (1943). But see Otis, *A Proposed Tribunal: Is It Constitutional?* 7 Kansas City L. Rev. 3 (1938); Brown, *The Impeachment of the Federal Judiciary*, 26 Harv. L. Rev. 684 694–695 (1913); *Clark* v. *United States*, 109 Ct. Cl. 444, 459, certiorari denied, 333 U.S. 833.

[21] See, also, *Hearings on The Judicial Reform Act, S. 3055 etc., Before the Senate Subcommittee on Improvements in Judicial Machinery*, Committee on the Judiciary, 90th Cong., 2d Sess. (1968).

to comport with the due-process requirements of advance notice of the charges and an opportunity to defend against them. When it entered its order of December 13, 1965, removing Judge Chandler from any further participation in judicial activities, the Judicial Council of the Tenth Circuit recited that it had been discussing his attitude and conduct for several years, observed that he had been a defendent in civil and criminal litigation, and noted that he had twice been the subject of mandamus proceedings to order him disqualified from continued participation in particular cases (Pet. App. ii). This order, however, was issued *ex parte,* without notice or hearing; and in our view neither the fact that the judges who comprise the Judicial Council had been reviewing the records in Judge Chandler's cases for years, nor the fact that in one of the mandamus actions (*Occidental Petroleum Corp.* v. *Chandler, supra,* 303 F. 2d at 57) the full court had conducted three days of factual hearings before sustaining the charge of bias, suffices to excuse the deficiencies in fair procedure.[22] At least in the absence of the most compelling showing that the fundamental integrity of the judicial process demands such action, no tribunal can be allowed by summary, *ex parte* procedures to assert non-feasance or misfeasance and to strip a federal judge of the incidents of his office. Cf. *Ex parte Robinson,* 19 Wall. 505, 512; compare *Ex parte Wall,* 107 U.S. 265, 271, 289–290.

[22] See *Hearings on the Judicial Reform Act, S. 3055, supra,* note 21, pp. 18, 38–39, 249–255; Tydings, *The Congress and the Courts: Helping the Judiciary to Help Itself,* 52 A.B.A.J. 321, 323 (1966).

Even if the order is to be "purely interlocutory," elementary standards of fairness dictate that such drastic action can not be taken unless grave consequences would surely follow from even the briefest delay. Cf. *Laughlin* v. *Wheat,* 95 2d 101, 102 (C.A. D.C.); see, also *Sniadach* v. *Family Finance Corp. of Bay View,* 395 U.S. 337.

But whether or not 28 U.S.C. 332 can constitutionally be construed to authorize divesting a federal judge of further duties, and even if it be assumed that the procedures followed by the Tenth Circuit Judicial Council in entering the December 13 order were inconsistent with due process, Judge Chandler would not be entitled to a writ of mandamus. The December 13 order was to be effective "until the further order of the Judicial Council" (Pet. App. ii). But when neither Judge Chandler nor any other judge indicated a willingness to attend the hearing subsequently scheduled for February 10, 1966, the Council reconvened on February 4 and entered a new order—expressly superseding the order of December 13—by which Judge Chandler was restored to the authority to hear and determine (pending) cases. Thus, since that first order, which impelled Judge Chandler to resort to this Court for relief, has long since been annulled by the action of the Judicial Council itself, it is both unnecessary and inappropriate, on an application for an extraordinary remedy, for the Court to discuss the difficult and delicate statutory and constitutional issues it posed. It is a fair prediction, we believe, that a recurrence of such an incident is highly unlikely.

B. THE ASSIGNMENT ORDER CURRENTLY IN EFFECT IS WITHIN THE LAWFUL AUTHORITY OF THE JUDICIAL COUNCIL

The order of the Judicial Council that is presently in force as effecting an assignment of business within the Western District of Oklahoma was entered on February 4, 1966 (Resp. Mem. pp. 10–16). That order, which is rested on the Council's authority under both 28 U.S.C. 137 and 332, restored to Judge Chandler all civil, bankruptcy, and criminal cases assigned to him prior to December 28, 1965, the date on which the Clerk of the District Court filed the Council's December 13 order. The present order also apportions new business, on a defined basis, among the other judges of the district. It is the view of the United States that this order is both substantively and procedurally valid.

Whether the order could have been issued under Section 137 alone, it is unnecessary to decide. That section authorizes and directs the judicial council for a circuit to make "necessary orders" for the division of business and assignment of cases in the event the judges of a multi-judge district cannot agree among themselves on these questions. In this capacity, judicial councils are entrusted with the power originally conferred upon the senior circuit judge—now called the chief judge of the circuit—by Section 23 of the Judicial Code of 1911, 36 Stat. 1090, 28 U.S.C. 27 (1940 ed.).

The power conferred by Section 137 extends to making binding, mandatory divisions not variable by the district judges affected, although the order may, as in this case, provide that it is subject to amendment

or modification upon the accord of the district judges. Compare *Ex parte Briggs,* 15 F. 2d 84, 87 (Van Valkenburgh, J., at chambers in St. Paul, Minnesota), with *Case* v. *United States,* 14 F. 2d 510, 513 (C.A. 8). Judge Chandler, however, disputes the relevance of this section because he claims there was no disagreement among the district judges within the meaning of the statute, since they disagreed only as to the disposition of matters theretofore assigned (to him), a category of business he argues is not encompassed by the statute. Neither the language of the original legislation in 1911 nor its present form provides much indication of congressional intent on this question. While there is some force to Judge Chandler's position that the statute was probably not concerned with disagreement over the division of work that has *already* been assigned, the question need not be resolved here. (The Judicial Council's interpretation, that on these facts a disagreement did exist, is also reasonable and is entitled to considerable weight.) It is unnecessary to pass upon Judge Chandler's proposed construction of Section 137 because the Council's outstanding order did not affect previously assigned cases; instead, as Judge Chandler insisted, it left them to him. Cases filed after December 28, 1965, were apportioned among the other district judges, an arrangement in which all judges, including Judge Chandler, expressly concurred. Whether under the circumstances the Council had authority to fix definite ratios for the assignment of future cases is a matter in which Judge Chandler, as distinguished from his brethren, has no litigable interest. And since the Council's order (Resp. Mem. p. 13)

explicitly authorizes the district judges to alter the arrangement by written agreement, it is difficult to see how anyone can complain of the order. Indeed, when, in July, 1967, the Council invited the district judges to consider whether they wished to modify the assignment designations, the judges unanimously expressed the view that the present system is satisfactory.

Supplementing the Council's authority to act under 28 U.S.C. 137 is its power under 28 U.S.C. 332 to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." That statute, in our view, is independently sufficient to sustain the Council's February 4 order directing Judge Chandler to dispose of his backlog of some 160 cases before certifying, as it was subsequently explained, that he is willing and able to undertake new assignments. Indeed such an order has been one of the more customary types of action taken by the various judicial councils under this section. See Shafroth, *Modern Developments in Judicial Administration,* 12 Am. U. L. Rev. 150, 160 (1963).

Although Judge Chandler has sought to characterize Section 332 as simply a "housekeeping" statute (Reply to Suggestion of Mootness, p. 5), this contention overlooks the deliberately broad responsibilities and powers Congress conferred on circuit judicial councils when it created them in 1939. True, one of the principal problems the councils were expected to deal with was the problem of the tardy trial judge who

failed to respond to informal exhortations.[23] For this reason the statute, which was in large measure the brainchild of Chief Justice Hughes and other Justices of this Court,[24] made it the express duty of the judge to carry out the "directions" or "orders" of the judicial council. See S. Rep. No. 426, 76th Cong., 1st Sess., p. 3 (1939); *House Hearings, supra,* pp. 13 (Chief Justice Groner), 21 (Judge John T. Parker); *Senate Hearings, supra,* pp. 11, 14 (Chief Justice Groner), 16, 18 (Arthur T. Vanderbilt), 34 (Alexander Holtzoff).

But the language of the statute is not limited to the mere abatement of delays in dispatching business, and the legislative history confirms that Section 332 should not be so narrowly construed.[25] Thus, Chief Justice Groner of the United States Court of Appeals for the District of Columbia, who was the Chairman of the Committee of the Judicial Conference of the United States that drafted the legislation, explained in the

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[23] In his biographical study of *William Howard Taft: Chief Justice* (1965), Alpheus Thomas Mason quotes a letter in which the late Chief Justice "helplessly" implored a district judge to dispose of a case pending before him for four years (p. 191):

> Of course I write this letter with no assumption that I may exercise direct authority over you in the discharge of your duties, but as head of the Federal judiciary I feel I do have to appeal to you, in its interest and in the interest of the public whom it is created to serve, to end this indefinite situation.

[24] See, generally, Chandler, *Some Major Advances in the Federal Judicial System*, 31 F.R.D. 307, 383–392 (1963).

[25] See *Jimenez* v. *Aristeguieta*, 311 F. 2d 547, 554 (C.A. 5), certiorari denied, 373 U.S. 914.

Senate Hearings, supra, p. 11, after noting the problems of delay:

> Those matters this bill undertakes to provide for by outlining certain duties of the judicial council. Under the present judicial set-up we have no authority to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, *or to take action as to any other matter which is the subject of criticism, or properly could be made the subject of criticism, for which he may be responsible.*
>
> The bill also provides what is not now true, that it shall be the duty of the district judges, when admonished or when matters are otherwise brought to his attention by the judicial council, *to take whatever steps are* thought to be necessary or *declared to be necessary to correct those things which ought to not exist in a well-run judicial system.* [Emphasis added.] [26]

Explaining the informational function to be served by the Director of the proposed Administrative Office, Chief Justice Groner later stated (*Senate Hearings,* pp. 12–13):

> It is his duty to observe and see that whatever is wrong in the administration of justice, from whatever sources it may arise, is brought to the attention of the judicial council that it may be corrected, by the courts themselves. * * *

And then again (*id.,* p. 14):

> I know that it may be said to be an acknowledgement by the courts of the necessity of which

[26] This part of the testimony was included in the Senate Report recommending passage of the bill. S. Rep. No. 426, *supra,* p. 3.

> I spoke in the beginning of my remarks, the duty and responsibility upon themselves of protecting themselves against the criticism or against those things which produce criticism. To that extent, it impinges upon what in the very beginning of things was considered to be the independence of the courts. At the present time a circuit judge or district judge is responsible to his conscience. This bill does impose some sort of instrumentality whereby, if his conscience is not sufficiently quickened, it may be quickened by some action on the part of the judicial council.
>
> It is not, I think, an unfair or an unwise impingement on the independence of the courts. I think the very necessities of the work, the strengthening of confidence on the part of the people is the first essential, and anything which properly provides for and leads to the accomplishment of that purpose, I am for. * * *

Before the House he explained that the mandatory nature of the Council's authority would be consistent with the traditional independence of the courts (*House Hearings, supra*, p. 16):

> I think, from the judges' standpoint, that is of primary importance; and give them a chance, as I said, perhaps brutally, to clean their own houses, and be certain that they have the confidence, which is the only asset that I know of that a judge has for sacrificing a professional career for a career on the bench—the confidence of the people will not be destroyed.

When Judge John J. Parker, Senior Judge of the Fourth Circuit, was asked whether the statute con-

tained "any restraint" on the authority of the council, he responded that the statute would have the widest scope practicable (*House Hearings,* p. 22):

> I do not think this bill does. Of course, I assume this is true: That the council will be restrained by the inherent limitations of the situation. They would know that, if they commanded a judge to do something, unnecessarily or unwisely, he would refuse to do it, and that would probably be the end of the matter.[27]

In light of these expansive statements, the Judicial Conference of the United States in 1961 adopted a report that rejects the narrow view of the power of judicial councils that Judge Chandler here puts forward. See *Report on the Powers and Responsibilities of the Judicial Councils,* H. Doc. No. 201, 87th Cong., 1st Sess. (1961). The report (p. 6) quotes the analysis reached by then Circuit Judge Warren E. Burger:

> These [last] two sentences of section 332 * * * are in general terms, but they are all-embracing and confer almost unlimited power. Any problem—whatever it may be—relating to the expeditious and effective administration of justice within the circuit is within the power of the circuit judicial council.

On the basis of the empirical evidence collected by the Judicial Conference Committee on the practical

[27] Arthur Vanderbilt explained to the Senate Committee that the bill had "teeth" in it because contumacious refusal to obey an order of a judicial council would be "perfectly just cause for the remedy and method of impeachment." *Senate Hearings,* p. 18. Chief Justice Groner expressed the same view to the House Committee. *House Hearings,* p. 14.

interpretation of Section 332 by the various judicial councils, the Report stated (p. 7):

> In other words, most of the councils appear, from the things with which they have dealt in these situations, to have recognized that their responsibilities and power extend, not merely to dealing with the questions of the handling and dispatching of a trial court's business in its technical sense, but also to dealing with the business of the judiciary in its broader or institutional sense, such as the preventing of any stigma, disrepute, or other element of loss of public confidence occurring as to the Federal courts or to the administration of justice by them, from any nature of action by an individual judge or a person attached to the courts.

The importance of the judicial councils in the administration of justice in the federal courts, the Report continued, is underscored by the variety of functions entrusted to councils by special statutes, including the authority, under 11 U.S.C. 62(b), to remove bankruptcy referees for cause (pp. 7–8).[28]

In concluding that Section 332 is entirely adequate as presently drafted for the judicial councils to perform supervisory functions beyond mere "housekeeping", the Report summarized (pp. 8–9):

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[28] See, also, Shafroth, *Modern Developments in Judicial Administration*, 12 Am. U. L. Rev. 150, 160 n. 18:

> A partial list of the statutes by which the judicial councils are given certain powers and duties include the following: 28 U.S.C. §§ 134 [authorize district judge to live outside his district], 137 [divide business among district judges in the absence of their agreement], 140(a) [authorize pretermission of session of court], * * * 294 [assign retired circuit or district judges to perform judicial duties], 295

On the basis of the foregoing, the Judicial Conference of the United States is of the following views and conclusions:

(1) Under section 332, the judicial councils are intended to have, and have, the responsibility of attempting to see that the business of each of the courts within the circuit is effectively and expeditiously administered.

(2) The responsibility of the councils "for the effective and expeditious administration of the business of the courts within its circuit" extends not merely to the business of the courts in its technical sense (judicial administration), such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense (administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the courts.

(3) The councils have the responsibility and owe the duty of taking such action as may be necessary, including the issuance of "all necessary orders," to attempt to accomplish these ends.

(4) These responsibilities should ordinarily be approached, in the spirit and tradition of the judicial institution, in an attitude of attempted cooperation and assistance to the dis-

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[consent to assignment of active circuit or district judge], 332 [the general statute here involved], 457 [direct location of records]; 11 U.S.C. 62(b) [remove bankruptcy referee for cause, after notice of hearing], 65 (a), (b) [recommend the number and territories of bankruptcy referees], 68 (a), (b), (c) [recommend salaries and fees of referees], 71 (b), (c) [recommended filling referee's vacancy]; * * *.

> trict courts and not of purported policemanship, since the purpose of the statute is to make the Council an instrument to help prevent problems from arising, to help find solutions for those which have arisen, as well as to take such corrective action for prevention or solution "as may be necessary."

We think that these conclusions are eminently sound, and that the outstanding order of the Judicial Council of the Tenth Circuit comports with them. The totality of circumstances recited in the Council's order of December 13 established a *prima facie* basis for taking *some* appropriate action to correct what the judges of the Council knew from their direct experiences and from matters of official record were actual or apparent threats to public confidence in the administration of justice. It was assumed throughout the consideration of Section 332 that the councils would ordinarily proceed *ex parte*. See, *e.g., House Hearings*, p. 14 (Chief Justice Groner). In proposing a draft bill to the Judicial Conference of the United States in 1938, Chief Justice Hughes had explained (as quoted in the 1961 Report of the Judicial Conference, *supra*, p. 3):

> When you come to the supervision of the work of the judges, * * * there you have the great advantage of the supervision of that work by the men who know. The circuit judges know the work of the district judges by their records that they are constantly examining, while the Supreme Court gets only an occasional one. And the circuit judges know the judges personally in their districts; they know their capacities.

> And if complaints are made, they have immediate resort to the means of ascertaining their validity. That direct supervision can be made very effective, and I think far more so than the more remote supervision, entailing a great deal of labor and circumlocution, imposed upon the Chief Justice.[29]

To the extent that due process of law demands that no action be taken on the basis of *ex parte* assertions or suspicions of impropriety or nonfeasance, the statute certainly allows the council sufficient flexibility to fashion whatever procedures constitutional values may warrant in particular instances. In this case, the Council did set the matter for a hearing after it entered its interlocutory order, but Judge Chandler refused to attend the hearing, even though he was authorized to be accompanied by counsel. His refusal to participate in the hearing that was offered cannot now be excused by the argument that he was challenging the very jurisdiction of the Council (Reply to Suggestion of Mootness, p. 3). By that time the issues and statutory premises for the Council's jurisdiction had sufficiently crystallized that Judge Chandler was not entitled to ignore with impunity the Council's order (Resp. Mem. pp. 5–7) setting the matter for a hearing. Nor, in our view, can he fairly contend that the breadth of the

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[29] Arthur Vanderbilt made the same point to the Senate Committee (*Senate Hearings*, p. 16):

> This bill has at least that very great advantage that, the circuit judges being responsible for the condition of the district courts within the circuits, have it within their power to know much more about what is going on in that circuit than could the Chief Justice or the Associate Justices of the Supreme Court here at Washington. * * *

invitation to "present such matters to the Council as he may deem fit" (Resp. Mem. p. 6) did not contain adequate notice of the subject matter of the hearing (Reply to Suggestion of Mootness, pp. 3–4). In its December 13 order, the Council had listed a number of specific grounds on which it believed there was a basis for assertion of its authority under 28 U.S.C. 332 (Pet. App. ii). Taken together, the Council's preliminary orders provided sufficiently specific information about the nature and purpose of a hearing to preclude Judge Chandler now from arguing that the extant order of February 4, 1966, is procedurally defective.

By the same token, the Council acted reasonably and within the ambit of its continuing authority in representing that it would consider modification of its assignment order (assuming the district judges had not agreed among themselves, as they were authorized to do, to alter it) upon Judge Chandler's certification that his backlog has been substantially reduced and that he is willing and able to undertake new assignments.

The United States appreciates the profound importance of maintaining an independent federal judiciary. But no judge of a lower federal court can claim that the Constitution forbids supervision of his official conduct—and his unofficial behavior insofar as it may affect the administration of public justice. Sections 137 and 332 of the Judicial Code are valid congressional responses to the need for the federal courts to maintain themselves as effective and trustworthy instru-

ments of justice. The only outstanding order of the Judicial Council of the Tenth Circuit, that entered on February 4, 1966, is authorized by these constitutional statutes and was validly promulgated.

CONCLUSION

The motion for leave to file a petition for a writ of mandamus and/or prohibition should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PHILIP A. LACOVARA,
Assistant to the Solicitor General.

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